

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

MOISES JOSUE CORTEZ,

Franzini,

Case No. 3:21-cv-00316-ART-CLB

## ORDER

BRANDON STUBBS, *et al.*,

## Defendants.

## I. SUMMARY

Plaintiff Moises Josue Cortez brings this action under 42 U.S.C. § 1983 against Defendants Shane Brown, Jesse Cox, Christopher Davis, David Drummond, Jose Guzman, Sean Johnson, Macelen Kleer, Chet Rigney, William Ruebart, Angela Searle, Brandon Stubbs, and James Weiland. Plaintiff alleges that Defendants used excessive force against him at Ely State Prison in violation of his Eighth Amendment rights. Plaintiff also alleges that Defendants were deliberately indifferent to his serious medical needs following the use of excessive force in violation of his Eighth Amendment rights. Finally, Plaintiff alleges that Defendants retaliated against him in violation of his First Amendment rights. (ECF No. 33.)

Before the Court is a Report and Recommendation (“R&R” or “Recommendation”) of United States Magistrate Judge Carla Baldwin (ECF No. 95), recommending the Court deny Defendants’ Motion for Summary Judgment (ECF No. 66). Defendants filed an objection to the R&R (ECF No. 96 (“Objection”)), to which Plaintiff responded (ECF No. 97). Because the Court agrees with Judge Baldwin’s analysis as to Defendants’ Motion, the Court will adopt the R&R in full. Accordingly, the Court will deny Defendants’ Motion for Summary Judgment.

## II. BACKGROUND

The Court incorporates by reference Judge Baldwin's recitation of the

1 relevant factual background and procedural history, which the Court adopts from  
2 the R&R. (ECF No. 95 at 2.)

3 **III. LEGAL STANDARD**

4 This Court “may accept, reject, or modify, in whole or in part, the findings  
5 or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where  
6 a party timely objects to a magistrate judge’s report and recommendation, then  
7 the Court is required to “make a de novo determination of those portions of the  
8 [report and recommendation] to which objection is made.” *Id.* Where a party fails  
9 to object to a magistrate judge’s recommendation, the Court is not required to  
10 conduct “any review at all . . . of any issue that is not the subject of an objection.”  
11 *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *see also United States v. Reyna-Tapia*,  
12 328 F.3d 1114, 1116 (9th Cir. 2003) (“De novo review of the magistrate judges’  
13 findings and recommendations is required if, but *only* if, one or both parties file  
14 objections to the findings and recommendations.”) (emphasis in original); Fed. R.  
15 Civ. P. 72, Advisory Committee Notes (1983) (providing that the Court “need only  
16 satisfy itself that there is no clear error on the face of the record in order to accept  
17 the recommendation.”).

18 Here, the Court’s review is de novo on the issues raised in Defendants’  
19 Objection. Those issues are Judge Baldwin’s finding that Defendants’ evidence is  
20 inadmissible, and that Defendants are not entitled to qualified immunity.

21 **IV. DISCUSSION**

22 Judge Baldwin’s Recommendation is based on narrow grounds and can be  
23 summarized simply: none of Defendants’ exhibits are certified or otherwise  
24 authenticated in violation of Fed. R. Civ. P. 56, so they lack foundation and may  
25 not be considered in support of their Motion for Summary Judgment. Defendants  
26 have therefore failed to support their Motion with admissible evidence sufficient  
27 to show that no genuine issues of triable fact exist. Thus, their Motion must be  
28 denied.

1 Defendants do not challenge the clear Ninth Circuit precedent Judge  
2 Baldwin cites in the Recommendation, conceding that only admissible evidence  
3 may be considered on a motion for summary judgment and that authentication  
4 is a condition precedent to admissibility. Defendants argue that while the exhibits  
5 lack authenticating declarations, the exhibits have been authenticated in other  
6 ways, including because of their distinctive appearance, because Plaintiff relied  
7 on the same documents in his Response to Defendants Motion for Summary  
8 Judgment, because Plaintiff did not object to the exhibits' authenticity, and  
9 because Defendants attached authenticating declarations to their Objection. The  
10 Court is not persuaded by Defendants' arguments.

11 “[U]nauthenticated documents cannot be considered on a motion for  
12 summary judgment . . . documents must be authenticated by and attached to an  
13 affidavit that meets the requirements of [Rule] 56(e) and the affiant must be a  
14 person through whom the exhibits could be admitted into evidence.” *Canada v.*  
15 *Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) (internal quotation  
16 marks and citations omitted). “This court has consistently held that documents  
17 which have not had a proper foundation laid to authenticate them cannot support  
18 a motion for summary judgment.” *Id.* (citing *Hamilton v. Keystone Tankship*  
19 *Corp.*, 539 F.2d 684, 686 (9th Cir.1976); *United States v. Dibble*, 429 F.2d 598,  
20 601–02 (9th Cir.1970)). Because Defendants failed to attach their exhibits to an  
21 authenticating affidavit, their exhibits are not admissible to support their Motion  
22 for Summary Judgment.

23 Further, LR 7-2(g) states that “[a] party may not file supplemental  
24 pleadings, briefs, authorities, or evidence without leave of court granted for good  
25 cause. The judge may strike supplemental filings made without leave of court.”  
26 Defendants have not requested leave of court for the authenticating affidavits it  
27 attached to its Objection. The Court therefore strikes those affidavits and finds  
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1 that all of Defendants' arguments for admissibility of the exhibits attached to  
2 their Motion for Summary Judgment fail.

3 Because their Motion for Summary Judgment lacks evidence, Defendants  
4 cannot succeed on their qualified immunity defense. Plaintiff's arguments that  
5 force was applied maliciously and sadistically, that ten months passed between  
6 his injuries and medical care, and that Defendants' retaliatory actions chilled his  
7 First Amendment rights are all unrebutted by evidence. Each of those claims as  
8 alleged involves the violation of clearly established constitutional rights. Thus,  
9 Defendants' qualified immunity defense fails.

10 **V. CONCLUSION**

11 It is therefore ordered that Defendants' Objection (ECF No. 96) to the Report  
12 and Recommendation of U.S. Magistrate Judge Carla Baldwin is overruled. The  
13 Report and Recommendation (ECF No. 95) is therefore adopted in full.

14 It is further ordered that Defendants' Motion for Summary Judgment (ECF  
15 No. 66) is DENIED.

16 Pursuant to LR 16-5, the Court finds that it is appropriate to refer this case  
17 U.S. Magistrate Judge Carla Baldwin to conduct a settlement conference. The  
18 deadline for filing the joint pretrial order is extended until 30 days after the  
19 conclusion of the settlement conference.

20  
21 DATED THIS 29<sup>th</sup> day of March 2024.

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24 ANNE R. TRAUM  
25 UNITED STATES DISTRICT JUDGE  
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